Supreme Court, U.S.
FILED
OCT 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-409 (4)

In The
Supreme Court of the United States
October Term, 1985

DANIEL GLEN HUNT, by and through his father and next friend, EDWARD RAY HUNT, and EDWARD RAY HUNT and ELLEN HUNT,

Petitioners,

v.

GUILFORD COUNTY BOARD OF EDUCATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

JOHN W. HARDY
Post Office Box 419
Greensboro, North Carolina 27402
(919) 378-0580

Counsel for Petitioners

Of Counsel:
JAMES WILLIAM LUNG

October 8, 1985

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

13 pp

QUESTION PRESENTED

Can parents of a handicapped child maintain an action under 42 U.S.C. § 1983 to assert a claim for damages against a local board of education for a violation of the procedures set out in the Education for All Handicapped Children Act, 20 U.S.C. § 1415, when the parents do not allege that the violation can be attributed or imputed to the local board?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Statement of the Case	1
Argument	3
I. The Fourth Circuit did not err in affirming decision of the District Court	3
II. The decision below does not conflict with the decisions of other Courts of Appeals	5
III. This case is an inappropriate vehicle for resolving the question of whether or not the procedural safeguards set out in the EAHCA were intended by Congress prelude resort to § 1983 to remedy a violation of those procedures	6
Conclusion	8

TABLE OF AUTHORITIES

CASES:

Hymes v. Harnett County Board of Education, 664 F2d 410 (4th Cir. 1981) 3, 4, 5

Manecke v. School Board of Pinellas County, Florida, 762 F.2d 912 (11th Cir. 1984) 6, 7

Monell v. Dept. of Soc. Serv. of City of N.Y., 436 U.S. 658, 56 L. Ed. 2d 611, 98 S.Ct. 2018 (1978) 4

Polk County v. Dodson, 454 U.S. 312, 70 L.Ed. 509, 102 S.Ct. 445 (1981) 5

Quackenbush v. Johnson City School District, 716 F.2d 141 (2nd Cir. 1983) 5

Rose v. Nebraska, 748 F.2d 1258 (8th Cir. 1984) 7

Smith v. Robinson, — U.S. —, 104 S.Ct. 3457, 82 L.Ed. 2d 746 (1984) 6, 7

TABLE OF AUTHORITIES—Continued

Page

STATUTES AND REGULATIONS:

34 C.F.R. § 300.507(a)(1) 2
20 U.S.C. § 1401 ..... *passim*
20 U.S.C. § 1414(b)(2) 2
42 U.S.C. § 1983 ..... *passim*

No. 85-409

In The

Supreme Court of the United States

October Term, 1985

DANIEL GLEN HUNT, by and through his father and next friend, EDWARD RAY HUNT, and EDWARD RAY HUNT and ELLEN HUNT,

Petitioners,

v.

GUILFORD COUNTY BOARD OF EDUCATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The facts of the case are stated fully in the decision of the District Court (Petitioners' Appendix pp. 2-28) However, Petitioners have attempted in their Statement of Facts to avoid a crucial fact in the case by misstating

the status of the administrative hearing officer. This misstatement requires elaboration.

The administrative hearing officer was not, as stated by Petitioners, "the Respondent's administrative hearing officer." (Petitioners' Brief pp. 6, 8) Petitioners did not allege in their amended complaint that the hearing officer was an agent or employee of Respondent or under the direction or control of Respondent, nor have Petitioners alleged any fact from which it might be inferred that the failure of the administrative hearing officer to render a decision can be imputed to the Respondent Guilford County Board of Education. (*See* Petitioners' Appendix, pp. 54-59)

Section 1414(b)(2) of the Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq., requires that

> No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such (local educational) agency or unit involved in the education or care of the child.

The regulations promulgated by the Department of Education to enforce the Education for all Handicapped Children Act also require that a hearing may not be conducted by a person who is an employee of a public agency which is involved in the education or care of a child. 34 C.F.R. § 300.507(a)(1).

Respondent complied with the requirements of the EAHCA with respect to the independence of the hearing officer. The hearing officer was not an agent or employee of the Guilford County Board of Education.

Petitioners misstate the relationship between Respondent and the administrative hearing officer. There is ab-

solutely no basis for the assertion by Petitioners in their brief that the administrative hearing officer in this case was "Respondent's hearing officer."

ARGUMENT

I. THE FOURTH CIRCUIT DID NOT ERR IN AFFIRMING DECISION OF THE DISTRICT COURT.

The issue before the Court of Appeals was whether or not the District Court erred in dismissing Petitioners' claim for damages under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Petitioners assert that the hearing officer in this case failed to render a final decision as required by the EAHCA, and that this failure gives rise to a cause of action for damages and attorney's fees under 42 U.S.C. § 1983.

The primary reason given by the District Court for the dismissal of this claim was that the "comprehensive nature of the EAHCA's remedial scheme" precluded resort to Section 1983 where the 1983 claim is one for damages for violation of either the substance or the procedures of the EAHCA. (Petitioners' Appendix, 46) Contrary to Petitioners' argument, this holding is entirely consistent with the Fourth Circuit holding in *Hymes v. Harnett County Board of Education*, 664 F.2d 410 (4th Cir. 1981).

Hymes holds that a plaintiff may obtain injunctive relief under 42 U.S.C. § 1983 where plaintiffs have had to resort to judicial relief to force a local education agency to comply with the procedures set out in the EAHCA. Pe-

titioners did not seek an injunction to require the hearing officer in this case to render a decision. Rather, Petitioners chose to file an action seeking money damages and attorney's fees under § 1983. The District Court properly relied upon *Hymes v. Harnett County Board of Education,* 664 F.2d 410 (4th Cir. 1981) in dismissing petitioners' claim.

A second and more important basis for dismissing Petitioners' purported claim under § 1983 was alluded to in the opinion of the District Court when it found as a fact that

> Defendants (including Respondent) did not deny the Hunts any avenue for administrative relief under state law or make a sham of those avenues.

(Petitioners' Appendix 47; Petitioners' Brief 8.)

It has already been pointed out that Petitioners do not allege that the administrative hearing officer was an agent or employee of Respondent Guilford County Board of Education. Even if this were the case, merely showing an employment or agency relationship between the Respondent and the hearing officer would not be sufficient to state a cause of action against the Respondent for the failure of the hearing officer to render a decision. This Court in *Monell v. Dept. of Soc. Serv. of City of N.Y.,* 436 U.S. 658, 56 L. Ed. 2d 611, 98 S.Ct. 2018 (1978) stated that

> . . . a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Ibid, 436 U.S. 658, 694, 56 L.Ed. 2d 611, —, 98 S.Ct. 2018, 2037-38. Section 1983 will not support a claim based upon a *respondeat superior* theory of liability. *Polk County v. Dodson,* 454 U.S. 312, 70 L.Ed. 509, 102 S.Ct. 445 (1981).

There is thus a basis for dismissing Petitioners' claim which is totally unrelated to the relationship between the EAHCA and § 1983. Petitioners failed to allege that the hearing officer was acting pursuant to a policy or custom of the Respondent Guilford County Board of Education. Petitioners have thus failed to allege an essential element of their cause of action under § 1983 and the claim was properly dismissed on that basis.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS

All cases addressing the interplay between the EAHCA and 42 U.S.C. § 1983 cited by Petitioners can be distinguished from the instant case. The cases cited by Petitioners all address a violation of the procedural requirements of the EAHCA by an agent or employee of a local educational agency. The case below does not.

In *Hymes v. Harnett County Board of Education,* 664 F.2d 410 (4th Cir. 1981), agents of a local school board changed the educational placement of a child without complying with the procedures set out in the EAHCA. In *Quackenbush v. Johnson City School District,* 716 F.2d 141 (2nd Cir. 1983) it was alleged that an employee of a local school district denied a child an evaluation which had been requested by the child's parent by having the

mother sign a blank form and then checking the box on the form which indicated an evaluation was not desired. In *Manecke v. School Board of Pinellas County, Florida,* 762 F.2d 912 (11th Cir. 1984), the parents of a handicapped child forwarded a request for a due process hearing to the school superintendent, who forwarded the request to the school board attorney, assuming that the attorney would schedule a due process hearing. The hearing was not scheduled within the time limitations of the EAHCA.

As has been previously demonstrated, Petitioners in this case have not alleged that the procedural violation of EAHCA was caused by an agent or employee of the Respondent, or that it was a result of a policy or practice of the Guilford County Board of Education. This case, because of its unique factual background, is clearly distinguishable from the cases cited by Petitioners and is not in conflict with those cases.

III. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR RESOLVING THE QUESTION OF WHETHER OR NOT THE PROCEDURAL SAFEGUARDS SET OUT IN THE EAHCA WERE INTENDED BY CONGRESS TO PRECLUDE RESORT TO § 1983 TO REMEDY A VIOLATION OF THOSE PROCEDURES

This Court held in *Smith v. Robinson,* — U.S. —, 104 S.Ct. 3457, 82 L.Ed. 2d 746 (1984) that the Education for All Handicapped Children Act is the exclusive vehicle through which a plaintiff may assert an equal protection claim to a publicly financed education. The Court left unresolved the question of whether or not plaintiffs may maintain an independent due process challenge to state procedures under § 1983. There are a number of reasons

why this case is not an appropriate vehicle for answering that question.

First, the issue is not ripe for review by this Court. There have been only two published decisions of Circuit Courts of Appeals since *Smith v. Robinson* which address this issue. Neither *Manecke v. School Board of Pinellas County, Florida,* 762 F.2d 912 (11th Cir. 1984) nor *Rose v. Nebraska,* 748 F.2d 1258 (8th Cir. 1984) address the issues which this Court in footnote 17 of its opinion in *Smith v. Robinson* suggested need to be addressed to resolve the question.

Second, if the issue is ripe for review, then the Court has before it a much more appropriate case in which to grant Certiorari. On March 15, 1985, the State of Nebraska filed a Petition for Certiorari in the case of *Rose v. Nebraska,* 748 F.2d 1258 (8th Cir. 1984). *See* 53 U.S.L.W. 3815. In *Rose v. Nebraska* the attorney's fee question has been addressed in two District Court opinions, 491 F.Supp. 1074 and 575 F.Supp. 132, and three Eighth Circuit opinions, 645 F.2d 592, 687 F.2d 1164, and 748 F.2d 1258.

A third reason why this case is not an appropriate vehicle for answering the question left open by *Smith v. Robinson* is the complexity of the case below. Plaintiffs cited five separate state and federal statutes as the basis for liability on the part of a number of defendants who are no longer parties in this action. Plaintiffs also sought other and different forms of relief than those which are available under 42 U.S.C. § 1983. In fact, the precise question raised by Petitioners in this Petition for Certiorari was pursued by them aggressively only after this Court in *Smith v. Robinson* foreclosed any possibility of recover-

ing attorney's fees except under the issue which Petitioners purport to present.

CONCLUSION

In conclusion, the question presented by Petitioners was fully and fairly addressed by the Court below. Their lawsuit was properly dismissed because they failed to allege an essential element of their cause of action. Finally, to the extent that Petitioners present a conflict among the Circuit Courts of Appeals, that conflict cannot be adequately addressed in the case at bar.

Respectfully submitted,

JOHN W. HARDY
110 Commerce Place
Post Office Box 419
Greensboro, North Carolina 27402
(919) 378-0580
Counsel for Petitioners

Of Counsel:
JAMES WILLIAM LUNG
110 Commerce Place
Post Office Box 419
Greensboro, North Carolina 27402
(919) 378-0580